FILED
NOV 7 195
JOHN T. FEY, Cle

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 489

VAN CURLER BROADCASTING CORPORATION, *Petitioner,*

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, and HUDSON VALLEY BROADCASTING COMPANY, INC., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT HUDSON VALLEY BROADCASTING COMPANY, INC.

D. M. PATRICK
STANLEY S. HARRIS

Attorneys for Respondent
Hudson Valley Broadcasting Co., Inc.

810 Colorado Building
Washington 5, D. C.

Of Counsel:

HOGAN & HARTSON
Washington, D. C.

November 7, 1956

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Questions Presented	1
Counterstatement of the Case	1
Argument	5
Preliminary Statement	5
As to Petitioner's "Question 1"	6
As to Petitioner's "Question 2"	10
As to Petitioner's "Question 3"	10
Conclusion	13
Appendix	15

AUTHORITIES CITED

CASES:

Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945) . . . 1, 10
Coastal Bend Television Co. v. FCC, 234 F. 2d 686 (D.C. Cir. 1956) . . . 5
FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940) . . . 12
Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) . . . 5
Logansport Broadcasting Co. v. United States, 93 App. D.C. 342, 210 F. 2d 24 (1954) . . . 6, 12
Peoples Broadcasting Co. v. United States, 93 App. D.C. 78, 209 F. 2d 286 (1953) . . . 6
NLRB v. Pittsburgh Steamship Co., 340 U.S. 498 (1951) . . . 5
Willapoint Oysters, Inc. v. Ewing, 174 F. 2d 676 (9th Cir.), *cert. denied*, 338 U.S. 860 (1949) . . . 6

STATUTE:

Administrative Procedure Act of 1946, 5 U.S.C. § 1001 *et seq.*
Section 4 . . . 2, 6, 8, 10, 11

MISCELLANEOUS:

Rule 19(1)(b) of the Rules of the Supreme Court of the United States . . . 5
Administrative Procedure Act, Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. (1946) . . . 8, 11
Television Digest, October 8, 1955 . . . 9, 15, 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 489

VAN CURLER BROADCASTING CORPORATION, *Petitioner,*

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, and HUDSON VALLEY BROADCASTING COMPANY, INC., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENT HUDSON VALLEY BROADCASTING COMPANY, INC.

QUESTIONS PRESENTED

1. Whether the Commission erred in receiving informal suggestions directed not to this proceeding but to nationwide television allocation problems during the pendency of a rule making proceeding looking toward the addition of VHF television channel 10 to Vail Mills, New York.

2. Whether the Commission acted inconsistently with *Ashbacker Radio Corp.* v. *FCC,* 326 U.S. 327

(1945), when it adopted the proposal to add Channel 10 to Vail Mills and simultaneously denied petitioner's counterproposal to delete the only existing VHF channel in the area.

3. Whether the Court of Appeals erred in holding that the Commission's report and order does contain "a concise general statement of the basis and purpose" of the addition of Channel 10 to the area, as required by section 4(b) of the Administrative Procedure Act, 5 U.S.C. § 1003(b).

COUNTERSTATEMENT OF THE CASE

The temptations of advocacy resulted in a statement on behalf of petitioner which in major respects does not represent the true nature of the controversy under consideration. Accordingly, a few further factual observations are required.

Petitioner challenges the validity of the allocation by the Federal Communications Commission of VHF television channel 10 to Vail Mills, New York. In its petition, Van Curler Broadcasting Corporation alludes to the fact that Vail Mills has a population of only some 250 persons. (Petition pp. 4, 12.) This is correct. However, petitioner neglects to inform the Court that a VHF television operation on Channel 10 at Vail Mills will result in a Grade A signal being received in the highly populous Tri-Cities area of New York, encompassing Albany, Troy, and Schenectady.

Thus, facts before the Commission demonstrated, among other things, that a Channel 10 operation from Vail Mills would furnish a Grade A television signal to 842,752 people, and a Grade B signal to 1,187,686 people. An area of over 2,000 square miles, containing

24,479 families, would receive a Grade A signal from such a station which now receives no other Grade A signal at all. Respondent Hudson Valley Broadcasting Company presently operates a UHF television station in Albany; the Grade B contour on Channel 10 from Vail Mills would encompass three times the area and twice the population of Hudson Valley's present UHF operation. [R. 366 (J.A. 51-52), R. 899 (J.A. 84-85).] Further, letters from responsible organizations in the area speaking for over 250,000 people were submitted to the Commission urging the allocation of Channel 10. [R. 81 (J.A. 23-24), R. 82-204, R. 899 (J.A. 85).] The Commission's allocation of Channel 10 to Vail Mills was based upon facts such as these.

Petitioner Van Curler does not portray accurately the competitive broadcast situation in the Tri-Cities area at the time of the allocation. Only two television stations were then in operation in Albany-Troy-Schenectady. One was a VHF television station owned and operated by the General Electric Company. The other was respondent Hudson Valley's UHF station.[1] Thus, at the time of the allocation, one UHF station (respondent Hudson Valley's) was competing with one VHF station in the Tri-Cities, and respondent's station was suffering heavy operating losses.[2] [R. 308 (J.A. 35-36), R. 355 (J.A. 44), R. 898 (J.A. 84).]

---

[1] The allocation of Channel 10 to Vail Mills was made on November 10, 1955. At that time, petitioner's UHF station in Troy was not in operation, having left the air on January 31, 1955, due to operating losses. [R. 308 (J.A. 36).] It should be noted, however, that petitioner's station recently (June 15, 1956) resumed operations with a limited program schedule.

[2] The case below was a consolidated one, including two petitions for review. One, Case No. 12989, was brought by Greylock Broadcasting Company, which formerly operated a UHF station

Clarification also is called for with regard to the nature of the allocation which petitioner seeks to have this Court review. Van Curler's petition loosely contends that the allocation of Channel 10 to the area would result in less stations rather than more. (Petition pp. 5, 22.) Such arguments are without merit, and are based upon sheer speculation as to the future competitive effects of a new VHF station in the area. In fact, the evidence before the Commission pointed to contrary assumptions. Respondent Hudson Valley determined that Channel 10 could be added to Vail Mills in compliance with the Commission's existing engineering standards. The ultimate addition of Channel 10 by the Commission left undisturbed all of the other allocations in the area, and simply provided one more channel upon which a television station could be operated to serve the public.

In attempting to make this case appear to be of importance to other than the parties, petitioner also states: "The issues so impressed the Court of Appeals that it heard argument *en banc* on its own motion." (Petition p. 12, see also Petition p. 25.) This is incorrect.

While petitioner and Greylock Broadcasting Company were appealing from the allocation of Channel 10 and the denial of Van Curler's deintermixture proposal, eight other appeals were noted involving other deintermixture denials and the grants of VHF con-

in Pittsfield, Massachusetts. Its Pittsfield studios were 30 miles from Albany and Troy, and 45 miles from Schenectady. [R. 53 (J.A. 17).] While its signal reached into parts of the Tri-Cities area, it was not a Tri-Cities station, just as a Baltimore station does not become a Washington station simply because its signal can be received in parts of the Washington area.

struction permits in the cities concerned. Those cases were consolidated, and became known as the *Coastal Bend* cases.[3] On February 20, 1956, the petitioners and appellants in the *Coastal Bend* cases filed motions in the Court of Appeals requesting that their cases be consolidated with the Channel 10 appeals, and that they be heard en banc. On February 23, 1956, responses thereto were filed by respondent Hudson Valley, and by the United States and the FCC. All three respondents opposed consolidation with the *Coastal Bend* cases, but stated they had no objection to the cases being heard en banc. They were subsequently designated on April 4, 1956, for en banc hearing.[4]

Certain further factual inaccuracies in Van Curler's petition for certiorari are treated in the Argument, *infra.*

ARGUMENT

Preliminary Statement

No sound reason is advanced by petitioner for the granting of a writ of certiorari in this case. None of the reasons justifying certiorari as set forth in Rule 19(b) of this Court are applicable here, and no other factors warranting the exercise of the Court's discretion have been presented by Van Curler.[5]

---

[3] Consolidated therein were Cases No. 13034, 13035, 13038, 13039, 13056, 13057, 13058, and 13065.

[4] The *Coastal Bend* cases were decided June 7, 1956, with the Court of Appeals unanimously affirming the Commission action there challenged. *Coastal Bend Television Co.* v. *FCC,* 234 F. 2d 686 (D.C. Cir. 1956).

[5] *E.g.,* see *NLRB* v. *Pittsburgh Steamship Co.,* 340 U.S. 498, 502 (1951); *Layne & Bowler Corp.* v. *Western Well Works, Inc.,* 261 U.S. 387, 393 (1923).

As to Petitioner's "Question 1"

The Administrative Procedure Act ". . . is based upon a broad and logical dichotomy between 'rule-making' and 'adjudication', *i.e.*, legislative and judicial functions."[6] The allocation of Channel 10 to Vail Mills was made by the Commission after a rule making proceeding which lasted nearly a year and resulted in a 960 page record. It was conducted in accordance with section 4 of the Administrative Procedure Act.[7] It is well settled (and petitioner does not challenge) that the Commission may allocate channels in its discretion pursuant to the rule making process.[8]

Petitioner does not contend that it was denied a full opportunity to be heard in the rule making proceeding, nor does it contend that the Commission's report and order is not supported by substantial evidence. Rather, it contends in its "Question 1" that the proceeding was invalidated by virtue of the fact that the Columbia Broadcasting System submitted to the Commission its suggestions as to the nationwide television allocation problems at a time when the instant proceeding was pending.

There are two fatal defects in petitioner's contentions. In the report and order which resulted in the

---

[6] *Willapoint Oysters, Inc.* v. *Ewing*, 174 F. 2d 676, 692 (9th Cir.), *cert. denied*, 338 U.S. 860 (1949).

[7] Act of June 12, 1946, c. 324, 60 STAT. 238, 5 U.S.C. § 1003.

[8] *Logansport Broadcasting Co.* v. *United States*, 93 App. D.C. 342, 210 F. 2d 24 (1954); *Peoples Broadcasting Co.* v. *United States*, 93 App. D.C. 78, 209 F. 2d 286 (1953). It should be noted that the "drop-in" here involved was not unusual; it represented the 21st time that a VHF channel has been added to an area in accordance with the Commission's existing engineering standards.

allocation of Channel 10 to Vail Mills and the denial of Van Curler's deintermixture proposal, the Commission decided five separate and distinct rule making matters.[9] It pointed out that suggestions on the nationwide problems had been received from various parties, but stressed that such suggestions did "not pertain to the merits of granting or denying the particular petitions before us, except as part of such a nationwide approach." [R. 955 (J.A. 104).] The Commission made it clear in its report and order that its decisions were based upon the records in the individual cases. [*Ibid;* see also R. 952 (J.A. 101).] Further, in certifying the record to the Court of Appeals, the Commission attached a sworn statement attesting that it contained all of the evidence which was considered in reaching the decisions involved.[10]

Seven judges of the Court of Appeals squarely held that CBS' nationwide comments, like those of others, were not directed toward, and had no effect upon, this particular proceeding. (Petition p. 5a.) Further, the two dissenting judges placed no reliance upon any ex-

---

[9] They involved Peoria, Illinois (Docket No. 11333); Evansville, Indiana (Docket No. 11334); Madison, Wisconsin and Rockford, Illinois (Docket No. 11335); Hartford, Connecticut (Docket No. 11336); and Albany-Troy-Schenectady (Docket No. 11238). [R. 948-51 (J.A. 94-99).]

[10] Petitioner relies upon the dissenting opinion of Commissioner Hyde, which included a statement that material beyond the record had been considered. (Petition p. 15.) However, Commissioner Hyde's dissent makes it clear that he was not referring to the allocation of Channel 10 to Vail Mills, nor did he refer to CBS' comments. Rather, his actual language reveals that he was dissenting solely to the denials of "some 26 petitions" for deintermixture, being of the view that *they* had not been considered properly on their merits. [R. 957-58 (J.A. 108-10).]

traneous nationwide suggestions. Van Curler makes no further showing in its petition for certiorari than it did in the Court of Appeals that the Commission's decision was in any way influenced by CBS' comments.[11]

There is a second fatal defect in petitioner's arguments. Factually, they are based upon a totally fallacious premise. Petitioner refers to "secret comments" and "secret intervention" on the part of CBS. (Petition pp. 2, 11, 14.) However, CBS' comments were not "secret," and CBS did not "intervene" (formally or otherwise) in this proceeding.

As an administrative agency of broad jurisdiction, of necessity the Commission at any given moment in time is affording concurrent consideration to numerous matters, some adjudicatory and some rule making in nature. So it was in this case. Various specific adjudicatory and rule making proceedings were pending, relating to television markets (areas) all over the

---

[11] It should be noted, however, that it would not have been improper even if the Commission had considered information from other sources in regard to the allocation of Channel 10. The purpose of section 4 of the Administrative Procedure Act was expansive rather than restrictive as regards the submission of comments. Speaking of the requirement of section 4(b) that interested parties be afforded an opportunity to present their views, both the Senate and House Reports accompanying the legislation made a particular point of stressing that:

> "This subsection states, in its first sentence, the minimum requirements of public rule making procedure short of statutory hearing. Under it agencies might in addition confer with industry advisory committees, consult organizations, hold informal 'hearings,' and the like."

Administrative Procedure Act, Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 200, 259 (1946).

country. While these matters were before the Commission, concern arose throughout the industry as to the entire nationwide television allocation system. Numerous informed industry organizations, including CBS, made available to the Commission their ideas as to how best to establish a nationwide competitive television structure.

CBS' comments, like those of numerous other organizations, were in no sense secret. They were directed to nationwide problems and were widely reported on in reliable industry publications. So that the Court may fully understand the true nature of what CBS suggested, respondent Hudson Valley is appending hereto the report published by *Television Digest* on the actual "secret" comments of which petitioner would make so much. (The same material also was submitted to the Court of Appeals as an appendix to Hudson Valley's brief.)

The Commission received the CBS comments, as it received those of others, quite properly seeking every possible informed opinion as to the nationwide allocation problems with which it was faced. This method of proceeding is completely normal and commonplace with the Commission, as anyone familiar with its practice knows.[12] In fact, it is difficult to imagine how the

---

[12] The truly frivolous nature of petitioner's arguments is illustrated by a reference to the proceeding in the Court of Appeals. Greylock Broadcasting Company, whose petition for review in Case No. 12989 was consolidated with Van Curler's Case No. 12987, also sought review of the allocation of Channel 10. Greylock, represented by competent and experienced counsel, never made any argument whatsoever in either its original brief or its reply brief to the effect that there was anything prejudicial or illegal about the submission of nationwide comments by anyone.

Commission could properly perform its complex duties in any other fashion.

As to Petitioner's "Question 2"

Like its first, petitioner's "Question 2" also is based upon a false premise. Petitioner asks this Court to determine whether the rule of the *Ashbacker* case,[13] holding that the Commission may not make an adjudicatory grant of one of two mutually exclusive applications without affording a hearing to the other, can be extended from the adjudicatory field into the rule making field. As a part of its argument, petitioner contends that the Commission granted respondent Hudson Valley's rule making proposal but "postponed consideration" of its counterproposal to remove all VHF channels from the Tri-Cities area. (Petition pp. 2, 16.)

However, such a situation is not presented here. At the conclusion of the lengthy rule making proceeding here involved, the Commission did not "postpone consideration" of petitioner's deintermixture proposal; it unequivocally and specifically denied it along with the others which were then before it. [R. 954 (J.A. 103), R. 956 (J.A. 107).] Further, respondent's proposal to add Channel 10 and petitioner's proposal to deintermix the area were not "mutually exclusive applications" within the scope of the *Ashbacker* case; they simply were counterproposals in a single rule making proceeding.

As to Petitioner's "Question 3"

Section 4(b) of the Administrative Procedure Act, pursuant to which the Commission's rules were

---

[13] *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945).

amended to provide for the allocation of Channel 10 to Vail Mills, provides that an agency "shall incorporate in any rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 1003(b).

In contending that the Commission's allocation of Channel 10 failed to comply with this requirement, petitioner is somewhat less than forthright. It extracts one phrase from the Commission's "concise general statement," and argues that it does not adequately give the "basis and purpose" of the allocation. (Petition pp. 18, 19, 23, 24.) However, one need only read the relevant portion of the actual report and order of the Commission to realize that it does indeed contain a concise general statement of the basis and purpose of the addition of a second VHF television service to an area of over one million people.[14] [R. 954 (J.A. 103-04).]

Petitioner advances numerous arguments which it contends the Commission should have answered specifically. However, both the legislative history of the Administrative Procedure Act and subsequent judicial decisions have made it clear that when acting legislatively through rule making, an agency need not answer every argument advanced by every participant in the proceeding.[15]

---

[14] Certain further facts on which the Commission based its general statement have been set forth on pp. 2-3 of the Counterstatement of the Case, *supra*.

[15] *E.g.*, the Attorney General stated:

> "Section 4(b), in requiring the publication of a concise general statement of the basis and purpose of rules made without formal hearing, is not intended to require an elaborate analysis of rules or of the detailed considerations upon which they are based, but is designed to enable the public to

In essence, it should be observed that all of petitioner's litigious efforts regarding the addition of a new television channel to the Tri-Cities area have been directed at keeping out further competition. However, this Court has made it clear that "the field of broadcasting is one of free competition," stating:

> "In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel."[16]

---

obtain a general idea of the purpose of, and a statement of the basic justification for, the rules."

Legislative History, supra n. 11, at 225, 409.

Further, it has been held that to require an agency to discuss every argument advanced "would be to impose upon it a totally unnecessary burden." *Logansport Broadcasting Co.* v. *United States, supra* n. 6, 93 App. D.C. at 346, 210 F. 2d at 28.

[16] *FCC* v. *Sanders Brothers Radio Station,* 309 U.S. 474-75 (1940).

CONCLUSION

Petitioner has presented no question which would warrant the issuance of a writ of certiorari. The decision of the Court of Appeals is eminently sound, and correctly ruled that the rule making proceeding which culminated in the allocation of Channel 10 to Vail Mills was conducted in full compliance with all applicable statutory and judicial standards. The petition for a writ of certiorari should be denied.

Respectfully submitted,

D. M. PATRICK
STANLEY S. HARRIS

Attorneys for Respondent
Hudson Valley Broadcasting Co., Inc.

810 Colorado Building
Washington 5, D. C.

Of Counsel:

HOGAN & HARTSON
Washington, D. C.

November 7, 1956

APPENDIX

Description of the Columbia Broadcasting System's suggestions on the nationwide allocation problems which was published on page 8 of the October 8, 1955 issue of *Television Digest:*

"Allocations changes suggested by virtually everyone so far have one thing in common—that substantial number of vhf assignments can be made in major cities by dropping present mileage-power minima. Where they differ is in degree—and the role of uhf.

"* * * [Suggestions of the American Broadcasting Company omitted]

"CBS's 'Plan A' would put 3 or more vhf channels in 84 of top 100 markets instead of 52 currently in prospect. It would do this by:

"(1) Reduction of co-channel mileages to 130 in Zone I, 140 in Zone II, 150 in Zone III—but protecting co-channel stations' Grade B contours even more than present rules protect them.

"(2) Use of directional antennas.

"(3) Employment of vertical polarization.

"(4) Deintermixture in Peoria and Madison only, leaving them all-uhf.

"(5) 'Move-ins' of 8 vhf stations from smaller to larger cities.

"CBS's 'Plan B' assumes 3 more channels might be obtained—88-94 mc from FM, 134-140 mc from military, 168-174 mc from govt. non-military—and uhf would be eliminated. This would provide 3 or more vhf channels in first 100 markets plus 50 or so more stations in markets not covered by stations in first 100 markets. Operating uhf stations would be shifted to vhf wherever possible, but some 60 uhfs wouldn't get vhf in their present markets.

"CBS presentation, submitted as letter to FCC, not a petition, recommends that Plan A be adopted immediately unless 3 extra channels can be obtained quickly. In latter case, it says Plan B is preferable.

"CBS acknowledges that there's conversion problem in Plan B; that present sets aren't equipped to get new channels. But it estimated conversions can be made for $10-$20, plus $10 more if vertical polarization is used.

"Criticism of 'Mullaney Plan,' advanced by CBS, is that new stations would be so closely spaced that they'd seriously reduce coverage of existing stations while having only very small coverage themselves."

A considerably more detailed analysis of the CBS suggestions (along with those of certain other organizations) may be found in *Broadcasting-Telecasting Magazine,* October 10, 1955, pp. 27-29.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 489

VAN CURLER BROADCASTING CORPORATION, *Petitioner,*

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION AND HUDSON VALLEY BROADCASTING CO., INC., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF OF VAN CURLER BROADCASTING CORPORATION

The petition for certiorari raised three questions of general importance to the administrative exercise of rule-making functions under Section 4 of the Administrative Procedure Act (5 U.S.C. § 1003). Respondents do not deny the importance of the first two of these questions. Rather, they contend that these questions are not actually presented by this case because the factual picture is not exactly as petitioner

painted it. Respondents do deny the importance of the third question, but their only argument in support of this denial is that the question, which has never been resolved by this court, was correctly decided below.

1. The first question asks whether the procedural safeguards provided for public rule making by Section 4 of the Administrative Procedure Act prohibit secret intervention by, and *in camera* arguments from, interested parties who have not made their appearance in the public proceedings held pursuant to Section 4. The government's brief does not deny the secret intervention or the *in camera* arguments. It does not deny that an interested network, the Columbia Broadcasting System (CBS), opposed each of petitioner's specific rule making proposals for television channel allocations in the Albany (Vail Mills) area at an "unprecedented" two-and-one-half hour, closed-door meeting with members of the Federal Communications Commission (Pet. 6-7, 15). It does not deny that petitioner was given no opportunity whatever to know the contents of the CBS presentation, or to rebut it. (Pet. 7, 13-16) It does not deny that this procedure violated the ground rules laid down by the Commission itself for this very case (Pet. 6-7, 14-15).

But, says the government, the Commission "did not consider this material in connection with the Vail Mills proceeding." (Br. 9) The record support given for this contention is the Commission's statement that the CBS comments did not "pertain to the merits of granting or denying the particular petitions before us, except as part of . . . a nationwide approach" [R. 955 (J.A. 104)]. Thus, the Commission did not say that it "did not consider" the material. It said only

that the material did not "pertain to" Vail Mills, "*except* as a part of . . . a nationwide approach." (Emphasis added) The Commission, moreover, admitted that it had "knowledge" of "suggestions informally submitted . . ." [R. 955 (J.A. 104-105)]. And, dissenting Commissioner Hyde stated that material "*de hors* the record, *has been considered* in reaching [the] conclusions" made in this case [R. 957 (J.A. 109), emphasis added].

The government's contention is thus without basis in the record. Moreover, even if the CBS presentation pertained to a nationwide proceeding, as the Commission's opinion states, the government cannot and does not deny that the presentation also related to the specific area in question here, i.e., Albany-Vail Mills. That the presentation related to more than one proceeding thus seems wholly irrelevant.

What effect the CBS presentation had upon the Commission is, of course, not clear from the record. Petitioner alleged that that effect was prejudicial because of the obvious inconsistency of the Commission's actions involving Vail Mills and Albany with its simultaneous other actions involving numerous other areas (Pet. 15-16, 8-9). We believe, however, that the arguments set forth in the petition show that the CBS *ex parte* intervention was error regardless of its effect upon the Commission. Administrative proceedings should not only do justice but should give the appearance of doing justice.

The petition shows, and the government does not deny, that the first question is of importance in the administrative exercise of rule making powers under the Administrative Procedure Act. The government's

painted it. Respondents do deny the importance of the third question, but their only argument in support of this denial is that the question, which has never been resolved by this court, was correctly decided below.

1. The first question asks whether the procedural safeguards provided for public rule making by Section 4 of the Administrative Procedure Act prohibit secret intervention by, and *in camera* arguments from, interested parties who have not made their appearance in the public proceedings held pursuant to Section 4. The government's brief does not deny the secret intervention or the *in camera* arguments. It does not deny that an interested network, the Columbia Broadcasting System (CBS), opposed each of petitioner's specific rule making proposals for television channel allocations in the Albany (Vail Mills) area at an "unprecedented" two-and-one-half hour, closed-door meeting with members of the Federal Communications Commission (Pet. 6-7, 15). It does not deny that petitioner was given no opportunity whatever to know the contents of the CBS presentation, or to rebut it. (Pet. 7, 13-16) It does not deny that this procedure violated the ground rules laid down by the Commission itself for this very case (Pet. 6-7, 14-15).

But, says the government, the Commission "did not consider this material in connection with the Vail Mills proceeding." (Br. 9) The record support given for this contention is the Commission's statement that the CBS comments did not "pertain to the merits of granting or denying the particular petitions before us, except as part of . . . a nationwide approach" [R. 955 (J.A. 104)]. Thus, the Commission did not say that it "did not consider" the material. It said only

that the material did not "pertain to" Vail Mills, "*except* as a part of . . . a nationwide approach." (Emphasis added) The Commission, moreover, admitted that it had "knowledge" of "suggestions informally submitted . . ." [R. 955 (J.A. 104-105)]. And, dissenting Commissioner Hyde stated that material "*de hors* the record, *has been considered* in reaching [the] conclusions" made in this case [R. 957 (J.A. 109), emphasis added].

The government's contention is thus without basis in the record. Moreover, even if the CBS presentation pertained to a nationwide proceeding, as the Commission's opinion states, the government cannot and does not deny that the presentation also related to the specific area in question here, i.e., Albany-Vail Mills. That the presentation related to more than one proceeding thus seems wholly irrelevant.

What effect the CBS presentation had upon the Commission is, of course, not clear from the record. Petitioner alleged that that effect was prejudicial because of the obvious inconsistency of the Commission's actions involving Vail Mills and Albany with its simultaneous other actions involving numerous other areas (Pet. 15-16, 8-9). We believe, however, that the arguments set forth in the petition show that the CBS *ex parte* intervention was error regardless of its effect upon the Commission. Administrative proceedings should not only do justice but should give the appearance of doing justice.

The petition shows, and the government does not deny, that the first question is of importance in the administrative exercise of rule making powers under the Administrative Procedure Act. The government's

attempts to avoid this question are, as we have just shown, without success. We submit that the question merits the grant of certiorari.

2. The second question asked whether rule-making proceedings under Section 4 of the Administrative Procedure Act are subject to the rule of *Ashbacker Radio Corp.* v. *Federal Communications Commission,* 326 U.S. 327, so that the Commission should not have granted the rule-making proposal of one party while at the same time postponing consideration of the mutually exclusive counter-proposal of another party. The respondents also seek to avoid this question.

The government concedes that the two rule-making proposals were mutually-exclusive, and it does not deny that one of them was granted and the second was not. The government contends however (Br. 9-10) that the Commission "did not postpone" the second proposal; "it denied it."

This is clearly a quibble. The record shows that while the second proposal, deintermixture, was in form denied; it was in substance postponed. The Commission simultaneously instituted a new proceeding to consider petitioner's and other parties' arguments for deintermixture [R. 953-954 (J.A. 102-103)]. While it denied petitioner's proposal pending the outcome of the new proceeding, it did so "without prejudice" to any action it might take on the proposal in the later proceeding, and without any consideration of the merits of deintermixture in Albany (Ibid).

Petitioner's proposal was thus denied in form but not in substance. The *Ashbacker* question, which the government does not deny is important, is therefore raised by this case and should be considered.

3. The third question asks whether the Commission complied with the provisions of Section 4 of the Administrative Procedure Act which require a statement of the "basis and purpose" of a new rule by promulgating such a rule with a general statement which made no reference to the issue posed in ordering rule making, and which gave no indication of the specific statutory basis for action. That the Commission's opinion failed to contain any language showing which of several statutory standards had been the basis for its action the government does not deny. Nor does the government deny that the Commission failed to resolve the basic factual question which the Commission had itself asked during the proceedings: whether the allocation of a VHF channel would prevent or hinder the ultimate utilization of the UHF channels already allocated to the area.

While not denying that the third question stated by petitioner is presented by this case, the government says this issue is unimportant. As our petition shows, however, this Court has repeatedly considered similar issues in pre-Administrative Procedure Act cases involving both rule making and adjudication before administrative agencies. Whether the doctrine of these cases is applicable to rule-making proceedings carried on pursuant to Section 4 of the Administrative Procedure Act has not yet been decided by this Court.

The decision of the court below on all three questions presented constitutes a ruling that the provisions of Section 4 of the Administrative Procedure Act do not impose upon administrative agencies promulgating rules some of the most rudimentary requirements of fair procedure applicable in adjudicatory proceedings.

The Court of Appeals for the District of Columbia Circuit is the principal court to which problems of federal administrative procedure are presented. An important pronouncement by that court *en banc* which, without precedent from this Court, relieves administrative agencies of compliance with standards of fairness, is clearly a proper subject of review by this Court.

Respectfully submitted,

PAUL A. PORTER
GEORGE BUNN
Attorneys for Petitioner, Van Curler Broadcasting Corporation

ARNOLD, FORTAS & PORTER
1229 19th Street, N. W.
Washington 6, D. C.
Of Counsel

November, 1956